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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AMANDA T., a Minor, etc., et al., Plaintiffs and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B161443 (Los Angeles County Super. Ct. No. TC014545)

APPEAL from a judgment of the Superior Court of Los Angeles County. Josh M. Fredricks, Judge. Affirmed.

Bob Clark, Jr., for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Stephen K. Hiura for Defendants and Respondents.

* * * * * *

Appellants Amanda T. and Michael T., as guardian ad litem for Amanda T. (Amanda), appeal from a judgment entered after a jury returned a special verdict in favor of respondents Los Angeles Unified School District (the District) and Mildred Hills, finding that appellants' claim was presented later than six months after the accrual of the cause of action. We affirm.

CONTENTIONS

Appellants contend that: (1) the trial court erred in granting the motion in limine; (2) the District waived the timeliness issue; and (3) the statute of limitations was tolled by fraud and concealment.

FACTS AND PROCEDURAL HISTORY

Amanda, a second grader, was prescribed Ritalin and Paxil three times a day commencing in September 1999, by Dr. Cindy Slominski, and Amanda's previous psychiatrist. Michael administered the morning dosage of Ritalin as well as all doses of Paxil. The school was to administer two dosages of Ritalin to Amanda. Dr. Slominski testified that on January 27, 2000, Michael advised her that Amanda had hidden some of the prescribed medication behind the toilet at home. Amanda told him that she did this because Hills, the school nurse, had told her she did not have to take the medication. He also stated that Amanda had not been receiving her dosage of Ritalin for three months, since November 1999. Dr. Slominski testified that Michael was extremely upset when he spoke with her. Michael told Dr. Slominski that he believed Amanda was engaging in self-mutilation because the school was not administering Ritalin to her as prescribed. After he met with Dr. Slominski, Michael spoke with Hills, who assured Michael that she gave Amanda the medication as prescribed, and showed him the medication charts indicating that she had done so.

On February 10, 2000, concerned when Amanda told him that people at school believed that he had abused Amanda, Michael went to Amanda's school to explain to the principal that Amanda had sustained an eye injury as a result of being hit with a ball at a

Chuck-E-Cheese's restaurant. While at the school, he told Tasha Inman, a child abuse investigator for the Los Angeles County Department of Children and Family Services (the Department) that he was concerned that Amanda's failure to receive her medication caused her to engage in self-mutilation. Michael left the school to get a medical report from the doctor who had treated Amanda's eye, but when he returned, the investigator had taken Amanda away. On February 11, 2000, Michael met with Dr. Slominski and told her that he was very upset that the school nurse continued to refuse to administer the medication to Amanda.

Amanda was returned to Michael's custody on July 3, 2000. On that same day, Michael received Amanda's case file and found a document referring to an interview by the social worker of Hills. The document shows that Hills stated: "Amanda does not appear [to] be more active than any other child so Ms. Bradley and I decided that Amanda did not need to take her medication Ritalin and Paxil."

Michael filed a claim against the District on September 28, 2000. On October 12, 2000, the District notified Michael that he did not include the date of loss on his claim. Michael sent an amended claim to the District on October 26, 2000, stating that Michael did not know of the complained-of acts until March 28, 2000. On November 21, 2000, the District sent a letter to Michael, advising him that his claim was rejected, and that subject to certain exceptions, Michael had until six months from the date the notice was personally delivered or deposited in the mail, to file a court action, under Government Code section 945.6.[1]

Michael filed a complaint for negligence and "intentional tort" against the District on May 17, 2001, and later added Hills, alleging that Hills made the decision to withhold Ritalin from Amanda, causing her severe distress.[2] On June 5, 2003, respondents filed a

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[1] All further statutory references are to the Government Code unless otherwise noted.

[2] The opening brief states that Amanda suffered substantial damages in being separated from her father. The brief also states that Amanda's failure to receive Ritalin

motion in limine to dismiss the complaint, or in the alternative, to bifurcate the trial on the issue of the statute of limitations. The trial court granted the motion and instructed the jury that a claim relating to a cause of action for injury to a person was required to be presented to the District no later than six months after the accrual of the cause of action. On June 20, 2002, the jury returned a special verdict in favor of the District, finding that Michael's claim was presented more than six months after the accrual of the cause of action.

This appeal followed.

DISCUSSION

I. Whether the trial court erred in granting the motion to bifurcate

In response to respondents' statement that appellants' brief is not clear as to whether they are complaining about lack of substantial evidence to support the jury's verdict or instructional error, appellants' urge in their reply brief that the trial court improperly granted the motion to bifurcate. However, neither the opening nor the reply brief contain any argument or points and authorities showing how the trial court abused its discretion in granting the motion, but seem to focus instead on whether the District waived the timeliness issue and whether the statute of limitations was tolled by fraud and concealment. Accordingly, we treat the issue of whether the trial court erred in granting the motion to bifurcate as waived. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

II. Whether the District waived the timeliness issue

The claims statutes are designed to give a public entity notice of the charges brought against it so that it can investigate the claims and settle them without litigation. (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705 (*Phillips*).) Under certain

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both caused her to make false statements that her father hit her and to try to kill herself by walking in front of a car.

Government Code sections, a statute of limitations defense may be waived if the public entity fails to provide notice of lack of timeliness. (*Ibid*.) Appellants contend that the District waived the timeliness issue by failing to give notice under those sections. We disagree.

Section 911.2 provides that a claim against a public entity must be presented not later than six months after the accrual of the cause of action. Section 901 provides that for purposes of computing the six-month limit, the date of accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations.

If the public entity determines that a claim "as presented" fails to comply with sections 910[3] and 910.2,[4] and is therefore defective, the public entity may give written notice of the claims' insufficiency within 20 days. (§ 910.8.) Section 911 advises that a defense as to the sufficiency of a claim based on a defect in the claim "as presented" is waived by failure to give notice of insufficiency as provided in section 910.8,[5] unless the claim "as presented" fails to give the claimant's address.

Under section 911.3, subdivision (a), the public entity must notify the claimant within 45 days after the claim is presented whether the claim, defective or otherwise, was

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[3] Section 910 requires that a claimant show the name and post office address of the claimant; the post office address to which the person presenting the claim desires notices to be sent; the date, place and circumstances of the occurrence giving rise to the asserted claim; a general description of the injury incurred; the names of the public employee causing the injury; and the amount claimed.

[4] Section 910.2 requires that the claim be signed by the claimant.

[5] Section 910.8 provides that: "If in the opinion of the board or the person designated by it a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, or with the requirements of a form provided under Section 910.4 if a claim is presented pursuant thereto, the board or such person may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. Such notice shall be given in the manner prescribed by Section 915.4. The board may not take action on the claim for a period of 15 days after such notice is given."

timely filed. Section 911.3, subdivision (a) further states that the notice shall explain that the claimant's only recourse is to apply for leave to present a late claim. Any defense to the time limit for presenting a claim is waived by the failure to give notice except when the claim "as presented" fails to state the address of the claimant. (§ 911.3, subd. (b).)

Appellants' argument that the District waived any statute of limitations issue because it failed to comply with section 911.3, subdivision (a) is not well taken. We conclude that the requirement that the District must give written notice within 45 days of the claim being presented applies only where the public entity can determine on the face of the claim that the claim is untimely.

In *Phillips*, our Supreme Court differentiated between a "claim" as a valid notice which complies with sections 910 and 910.2 and a "claim as presented." (*Phillips, supra,* 49 Cal.3d at p. 706.) The notice and defense-waiver provisions of sections 910.8 and 911 use the phrase "claim as presented" to identify a claim which is "defective" due to its failure to comply substantially with sections 910 and 910.2. It is only a "claim as presented" that fails to "comply substantially" that triggers the waiver provision of section 910.8 and 911.3. (*Phillips,* at p. 707.) "If the notice is untimely or lacks any information required by sections 910 and 910.2, the public entity may require the claimant to justify the delay or supply the missing data. If the public entity fails to require the claimant to cure such defects, then it waives certain defenses which are otherwise available to challenge a lawsuit based upon the claim." (*Id.* at p. 706.) Here, upon determining that the claim lacked the date of injury, the District required appellants to cure the defect. At that point, its only inquiry was whether the claim was timely on its face.

Moreover, a public entity cannot make factual investigations and determinations relating to the timeliness of the claim at the time it is presented. (*Mandjik v. Eden Township Hospital Dist.* (1992) 4 Cal.App.4th 1488, 1500.) Typically, when an untimely claim is rejected, the claimant may file an application for leave to present the late claim. (§ 911.4.) If that application is denied, the claimant must file a petition with the court for relief. (§ 946.6.) That procedure, while providing relief from default, is not designed to

resolve the issue of actual compliance with the claim filing requirements. (*Ngo v. County of Los Angeles* (1989) 207 Cal.App.3d 946-951 (*Ngo*).) If there is a dispute regarding the public entity's finding of untimeliness, the complainant's recourse is to file a complaint on the merits. (*Id.* at pp. 948-951.) The issue can then be determined by demurrer, motion for summary judgment, motion for judgment on the pleadings or motion to strike. (*Toscano v. County of Los Angeles* (1979) 92 Cal.App.3d 775, 783.) Where, as here, triable issues of fact exist as to whether there was timely compliance with the claims statute and whether the statute of limitations ran, both issues are jury questions. (*Ngo, supra,* 207 Cal.App.3d at p. 950; *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 612 [the date of accrual of the cause of action is subject to jury determination when factual issues are raised in connection with the tort claims statutes].) We conclude that the District did not waive the timeliness issue, but properly presented it as a jury issue.

Appellants further urge that if the District had advised them it was challenging the timeliness of the claim, they would have submitted an application to file a late claim. Under section 911.6, subdivision (b)(2), the public entity shall grant an application for leave to present a late claim where the person who sustained the injury was a minor. That application, however, must be presented within one year of the accrual of the cause of action. (§ 911 .4, subd. (b).) At the claim stage, as previously discussed, the District could only accept the facts as presented on the claim. Out of an abundance of caution, and in light of the knowledge that Michael had spoken with Dr. Slominski in January 2000 about his concerns that Amanda had not received Ritalin since November 1999, appellants could easily have filed a late claim application. (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 711-712, fn. 6 ["the careful practitioner will allege timely filing of a claim in the complaint, if appropriate, and also file a claim-relief petition if there is any question concerning compliance with the claim presentation requirements"].) Instead, appellants chose to file a civil complaint, and were unable to convince the jury of their version of the accrual date.

While appellants raised the waiver issue in their opposition to the District's motion to bifurcate, they never submitted a jury instruction regarding whether the District waived

the statute of limitations issue to the jury, and cannot now raise instructional error on appeal, if that is their intention. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1010.)

We conclude the District did not waive the timeliness issue.

III. Whether fraudulent concealment tolled the applicable time period

Appellants next urge that Hills's fraudulent concealment tolled the time limitation for filing a claim. They assert that because the school nurse denied that she had not been giving Amanda her medication and showed Michael records indicating that she had done so, the cause of action did not accrue until he received a report on July 3, 2000 from the Department which stated that Hills and Amanda's teacher had decided that Amanda did not need to take medication.

Fraudulent concealment tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by the plaintiff or until such time as the plaintiff, by the exercise of reasonable diligence, should have discovered it. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) Here, Dr. Slominski testified that in January 2000, Michael had told her that Amanda had hidden the prescribed medication behind the toilet at home because Hills had told her she did not have to take medication. Michael was upset and suspected that at that time, Amanda's self mutilation was caused by her failure to receive a sufficient dosage of Ritalin. While appellants point to the interview between the Department and Hills as evidence that Hills fraudulently concealed that she did not administer the medication, the document merely states that Hills and Ms. Bradley "decided that Amanda did not need to take her medication Ritalin and Paxil." The document upon which appellants rely does not indicate that Hills, despite her "decision," withheld the medication from Amanda. Thus, the jury found that Michael had or should have suspected wrongdoing more than six months before he filed his claim. Therefore, the cause of action accrued at the latest, when he suspected wrongdoing in January 27, 2000. Even if the damage occurred on February 10, 2000, when Amanda

was taken away by the Department, appellants filed their claim more than six months after that date, on September 28, 2000.

Nor are we convinced by appellants' argument that the medical malpractice statute of limitations, Code of Civil Procedure section 340.5,[6] applies here. Appellants' complaint pleaded ordinary rather than professional negligence. Moreover, the tolling provision contained in Code of Civil Procedure section 340.5 does not assist appellants, since, as previously discussed, the jury found that Michael should have suspected wrongdoing more than six months before appellants filed a claim.

Appellants also claim that they acted reasonably in pursuing the lawsuit as soon as Michael reviewed records from the Department which indicated that Hills and Amanda's teacher had, in Michael's words, decided to withhold medication from Amanda, citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103 (*Jolly*). *Jolly* does not assist appellants. In that case, the court recognized that the limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. (*Id.* at pp. 1110-1111.) In *Jolly*, the plaintiff suspected as early as 1978 that she had been injured by her mother's ingestion of estrogen diethylstilbestrol (DES) while the plaintiff was in the womb and that some wrongful conduct had occurred. The court determined that the plaintiff's action was therefore time-barred because she did not file her lawsuit within a year of her suspicion that the defendant's conduct was wrongful. Similarly, here, the evidence shows that Michael was suspicious that Amanda had not received her medication at the latest on January 27, 2000, more than six months prior to filing their claim against the District.

Appellants also cite a footnote in the *Jolly* opinion which refers to *Whitfield v. Roth* (1974) 10 Cal.3d 874, 887-889 (*Whitfield*), superseded by Code of Civil Procedure

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[6] Code of Civil Procedure section 340.5 provides that in a medical malpractice action, the time for commencement of action shall be three years after the date of injury or one year after the plaintiff discovers or should have discovered the injury. The statute also provides that the time limitation shall be tolled for minors during the time the health care provider committed fraud.

section 340.5, where the plaintiff filed her claim against the County of Los Angeles within 100 days of its accrual. There, the plaintiff was found to have exercised reasonable diligence in discovering the negligent cause of her child's injury from complications due to surgery, where the plaintiff had been informed for years that her daughter was not suffering from signs of organic brain disease, but from anorexia nervosa. It was not until the plaintiff received subpoenaed hospital records that she discovered that a previous physician had diagnosed and recommended a series of tests for a brain tumor, which had not been performed. (*Whitfield, supra,* at p. 889.)

Here, as previously noted, the record shows that Michael had a reasonable suspicion that Amanda's medication was not being administered to her as late as January 27, 2000. His argument that he did not know the cause of Amanda's behavioral problems until he reviewed the Department's file was rejected by the jury.

Analogizing to continuing nuisance cases, appellants also urge that each time Hills failed to administer the medication, a new statute of limitations began to run. Thus, appellants urge that the last time Hills failed to administer the medication was on February 10, 2000, when Amanda was removed from his care.

First, even assuming that the injury occurred on February 10, 2000, appellants filed the claim on September 28, 2000, more than six months after February 10, 2000. Under nuisance law, every continuance of the nuisance gives rise to a separate claim for damages caused by the nuisance. (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1093.) In breach of contract and insurer's refusal to defend cases, some courts have also construed a promise as continuing, so that each failure to perform results in a new breach, and new cause of action. (*McGrath v. County of Butte* (1939) 30 Cal.App.2d 734, 736; *Oil Base, Inc. v. Continental Cas. Co.* (1969) 271 Cal.App.2d 378, 389; contra, *State Farm Mut. Auto Ins. Co. v. Longden* (1987) 197 Cal.App.3d 226, 231 [the time of occurrence within the meaning of an indemnity policy is not when the wrongful act was committed, but when the party was damaged].) However, in ordinary negligence cases, the statute of limitations begins to run at the time the plaintiff discovered or should have discovered the injury. (*Nodine v. Shiley, Inc.* (9th Cir. 2001)

240 F.3d 1149, 1153; *Graham v. Hansen* (1982) 128 Cal.App.3d 965, 971.) Even where the statute of limitations has been held not to commence to run during the continuance of the relationship of physician and patient, it will begin to run at the time the patient has discovered the injury or through the use of reasonable diligence should have discovered it. (*Petrucci v. Heidenreich* (1941) 43 Cal.App.2d 561, 562.) In this case, the jury determined that Michael knew or should have known of the injury six months or more before the claim was filed. Moreover, since Michael did not submit any jury instructions on the subject of fraudulent concealment, any argument based on instructional error is waived. (*Weller v. American Broadcasting Companies, Inc., supra,* 232 Cal.App.3d at p. 1010.)

We conclude that the District did not waive the statute of limitations defense and that the alleged fraudulent concealment did not act to toll the limitations period.

DISPOSITION

The judgment is affirmed. Respondents shall receive costs of appeal.

NOT FOR PUBLICATION.

_____, J.
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We concur:

_____, P.J.
BOREN

_____, J.
ASHMANN-GERST